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Supreme Court of the United States

October Term 1968

No. 77

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE APPELLANTS

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January 23, 1969

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	2
Summary of Argument	5
Argument:	
I. The New York Criminal Anarchy Law violates the First and Fourteenth Amendments of the United States Constitution	9
A. The New York statute is both vague and overbroad	9
B. Abstention is inappropriate in the instant case	17
II. The new construction of the Criminal Anarchy Statute violates plaintiffs' right to due process of law	18
III. The monetary requirement for qualification as a grand juror violates the Equal Protection Clause of the Fourteenth Amendment	20
IV. Federal legislation has preempted the field of sedition and states may not pass statutes proscribing the overthrow of state governments	22
V. 28 U.S.C. §2283 does not bar the granting of an injunction in an action brought under 42 U.S.C. §1983	28

Page

Conclusion 35

Appendix 36

Citations

Cases:

Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 . . . . . 8, 30

Aptheker v. Secretary of State, 378 U.S. 500. . . . . 10, 25

Baggett v. Bullitt, 377 U.S. 360 . . . . . 6, 9, 15, 17

Baines v. City of Danville, 337 F. 2d 579 (4th Cir. 1964), *cert. denied* 381 U.S. 939. 28

Bouie v. City of Columbia, 378 U.S. 347 . . . . . 7, 19

Bridges v. California, 314 U.S. 252. . . . . 11, 14

Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd per curiam*, 352 U.S. 903 32

City of Greenwood v. Peacock, 384 U.S. 808. . . . . 33, 34, 35

Connally v. General Construction Co., 269 U.S. 385. . . 9

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 17

Cox v. New Hampshire, 312 U.S. 569 19

DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 . . . . . 25, 26, 27

Dennis v. United States, 341 U.S. 494 . . . . . 5, 6, 7, 11, 12, 15, 16

Dilworth v. Riner, 343 F. 2d 226 (5th Cir. 1965). 30

Cases (Continued): Page

Dombrowski v. Pfister,
380 U.S. 479 ..... 6, 9, 16, 17, 18, 19, 28, 32-33

Ex Parte Virginia, 100 U.S. 339 31

Ex Parte Young, 209 U.S. 123 17

Fox v. Ohio, 46 U.S. (5 How.) 410 25

Gilbert v. Minnesota, 254 U.S. 325 25

Harman v. Forssenius, 380 U.S. 528 ..... 6, 17

Harper v. Virginia Board of Elections,
383 U.S. 663 ..... 7, 20

Herndon v. Lowry, 301 U.S. 242 9

Hines v. Davidowitz, 312 U.S. 52 22

James v. United States, 366 U.S. 213 20

Keyishian v. Board of Regents, 385 U.S. 589 . . 5, 7, 9, 13, 18

Lambert v. California, 355 U.S. 225 18

Lanzetta v. New Jersey, 306 U.S. 451 ..... 9, 20

Leiter Minerals, Inc. v. United States,
352 U.S. 220 30

Luther v. Borden, 48 U.S. (7 How.) 1 26

McNeese v. Board of Education, 373 U.S. 668 17

Monroe v. Pape, 365 U.S. 167 31

Morrison v. Davis, 252 F. 2d 102 (5th Cir.
1958) *cert. denied*, 356 U.S. 968 32

N.A.A.C.P. v. Button, 371 U.S. 415 ..... 9, 10

New York Times Co. v. Sullivan,
376 U.S. 254 ..... 10, 14

Cases (Continued):

Page

Noto v. United States, 367 U.S. 290 25

Omaechevarria v. Idaho, 246 U.S. 343 13

Pennsylvania v. Nelson,
350 U.S. 497 ..... 8, 11, 22, 23, 25, 26, 27

People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S.
2d 9, *cert. denied* and *appeal dismissed*,
390 U.S. 29 ..... 5, 6, 10, 11, 12

People v. Ferguson, 55 Misc. 2d 823, 286
N.Y.S. 2d 748 (Supreme Court, Queens
County, 1968) 3, 11, 28

People v. Gitlow, 234 N.Y. 132 *aff'd*
268 U.S. 652 ..... 5, 10, 18, 22

Porter v. Dicken, 328 U.S. 252 30

Poulos v. New Hampshire, 345 U.S. 395 19

Railroad Commission v. Pullman, 312 U.S. 496 17

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 22

Scales v. United States, 367 U.S. 203 25

Smith v. Apple, 264 U.S. 274 ..... 8, 28

Smith v. California, 361 U.S. 147 9

Southern California Petroleum Corp. v. Harper,
273 F. 2d 715 (5th Cir. 1960) 29

Speiser v. Randall, 357 U.S. 513 9

Strauder v. West Virginia, 100 U.S. 303 30-31

Stromberg v. California, 283 U.S. 359 9

Thornhill v. Alabama, 310 U.S. 88 ..... 9, 10

Toucey v. New York Life Ins. Co., 314 U.S. 118 ... 8, 29, 30

Cases (Continued): Page

United States v. Murdock, 290 U.S. 389 20
United States v. Reese, 92 U.S. (2 Otto) 214 10
Uphaus v. Wyman, 360 U.S. 72 ..... 25, 26
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 13
Winters v. New York, 333 U.S. 507 ..... 9, 13, 16, 18
Yates v. United States, 354 U.S. 298 11
Zwickler v. Koota, 389 U.S. 241 ..... 6, 10, 16, 18

United States Constitution:

Article IV, §4 24
First Amendment 4, 5, 6, 9, 18
Fifth Amendment 4, 20
Fourteenth Amendment 2, 4, 5, 7, 9, 12, 20

Statutes:

Act of March 2, 1793, 1 Stat. 333, ch. 22 29
Act of April 20, 1871, 17 Stat. 13, ch. 22, §1 30
Communist Control Act of 1954, 50 U.S.C. §841 23
§842 23
§843 23
Internal Security Act of 1950, 50 U.S.C. §781 ..... 7-8, 23
§781(15) 24
Judicial Code of 1911, 36 Stat. 1162, §265. 29
Rev. Stat. §720 (1875) 29
Smith Act, 18 U.S.C. §2385 ..... 2, 4, 7, 22, 26
28 U.S.C. §1253 1
28 U.S.C. §2281 4

Citations (Continued):

	Page
28 U.S.C. §2283	2, 8, 9, 28, 29, 30, 32, 33
28 U.S.C. §2284	4
42 U.S.C. §1983	2, 8, 9, 28, 29, 30, 31, 33
New York Judiciary Law, §596(3)	2, 4, 5, 20
New York Penal Law	
§160	2, 4, 18, 22
§161	2, 4, 18, 22
§163	2, 4
§240.15	2-3
§580(1)	2, 4

Miscellaneous:

Conot, *Rivers of Blood, Years of Darkness*, (1967)	15
Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L. Rev. 92	31
Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67	10
Report of the National Advisory Committee on Civil Disorders	15

SUPREME COURT OF THE UNITED STATES

October Term, 1968
No. 580

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE APPELLANTS

Opinion Below

The opinion of the three-judge statutory court (A. 63a)[1] is reported at 288 F. Supp. 348.

Jurisdiction

The judgment of the three-judge statutory court was entered on June 27, 1968. An appeal was filed on July 15, 1968. The appeal was docketed on September 27, 1968, and probable jurisdiction was noted on December 9, 1968. The jurisdiction of this Court rests on 28 U.S.C. §1253.

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1. "A" refers to the Appendix, 40 copies of which have been filed in this Court.

Statutes Involved

The State statutes involved are former §§160, 161, 163 and 580(1) of the Penal Law of New York, and former §596(3) of the Judiciary Law of New York, *infra*, pp. 36-38.

The Federal statutes involved are 18 U.S.C. §2385 (Smith Act), 42 U.S.C. §1983, and 28 U.S.C. §2283, *infra*, pp. 38-39.

Questions Presented

(1) Are former §§160, 161, 163 and 580(1) of the Penal Law of New York, forbidding the advocacy of the violent overthrow of organized government, unconstitutionally vague and overbroad both on their face and as applied by the New York courts?

(2) Does federal legislation in the field of sedition preempt New York State from enacting a statute which purports to forbid advocacy of the overthrow of the Government of New York State?

(3) Does former §596(3) of the Judiciary Law of New York, establishing a monetary qualification for grand jury service, violate the Fourteenth Amendment?

(4) Is an action brought under 42 U.S.C. §1983 an exception to the prohibition against federal injunctions against state court proceedings contained in 28 U.S.C. §2283?

Statement of the Case

Plaintiffs are residents of the City and State of New York. On or about June 12, 1967, an indictment was filed in the Supreme Court, County of Queens, charging them with having violated New York's Criminal Anarchy Law, former §§160, 161, 163 and 580(1) of the Penal Law of New York.[2] Plain-

2. The Penal Law was amended effective September 1, 1967. Criminal Anarchy is now covered by Sec. 240.15 of the new Penal Law which reads as follows: "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the

tiffs were also charged in various counts with the illegal possession of weapons. At the same time a separate indictment (No. 1223-67) not involved herein was returned against two of the plaintiffs charging them with conspiracy to murder. These indictments led to a large number of press releases and news stories which not only linked all of the plaintiffs to the conspiracy to murder indictment but also set forth the alleged activities and aims of the Revolutionary Action Movement (the group to which the individual plaintiffs allegedly belonged) and the activities allegedly engaged in by the individual plaintiffs. (A sample of these stories is attached to plaintiffs' moving papers and form part of the record in this case.)

On January 10, 1968 demurrers to the indictment involved in the instant case were sustained and the indictment dismissed on the ground *inter alia* that it failed to specify what government was the object of the alleged conspiracy and that it failed to allege the requisite intent. *People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 748 (Supreme Court, Queens County, 1968).

On or about January 17, 1968 a new indictment (No. 134-68) was filed against the plaintiffs again charging them with advocating criminal anarchy, and with conspiring to commit criminal anarchy, but this time alleging intent and stating the object of the conspiracy to be the overthrow of the government of New York. Plaintiffs were also charged with conspiring to commit arson and, in 41 counts, with the illegal possession of weapons.

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existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow."

On March 12, 1968, plaintiffs[3] filed a complaint in the Southern District of New York, alleging that the Criminal Anarchy Law was void on its face and as applied to them in that it violated the First, Fifth and Fourteenth Amendment guarantees of free speech, press and assembly (A. 5a), and that the statute was vague and indefinite in violation of the guarantee of due process of law (A. 5a).

In addition, the complaint alleged (A. 5a), that the Criminal Anarchy Law was unconstitutional since it had been superseded by 18 U.S.C. §2385 (the Smith Act). The complaint also alleged (A. 6a) that former §596(3) of the Judiciary Law, governing the selection of grand jurors, violated the Fourteenth Amendment by requiring a $250.00 monetary qualification for grand jury service.

The plaintiffs asked for a declaratory judgment that former §§160, 161, 163 and 580(1) of the Penal Law of New York and former §596(3) of the Judiciary Law are null and void (A. 7a), and that a preliminary and a permanent injunction issue restraining the defendants from enforcing these sections against the plaintiffs (A. 7a). The convening of a three-judge court was requested, pursuant to 28 U.S.C. §§2281 and 2284 (A. 6a).

A hearing was held and the matter was referred to a three-judge court. The defendants filed answers (A. 48a, 49a) following which the plaintiffs moved for summary judgment

3. The indictment in the Supreme Court, County of Queens was returned against 15 people. Ten of them are plaintiffs in the present action. A similar action was started in the Eastern District of New York by Fred Fernandez, one of the other persons named in the indictment. That action was subsequently transferred to the Southern District of New York and consolidated with this action. A separate jurisdictional statement was filed in this Court on behalf of Fred Fernandez. This Court noted probable jurisdiction and ordered that the case (No. 813) be consolidated with this one.

(A. 50a). A hearing was then had before the three-judge court. On June 26, 1968, the court, relying mainly upon *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1968) *cert. denied and appeal dismissed* 390 U.S. 29, dismissed the complaint, holding that the sections of the Penal Law under attack were constitutional and had not been superseded by the Smith Act (A. 69a, 70a). In addition, the court, relying upon an affidavit submitted by the defendants stating that the $250.00 monetary qualification for grand jury service had not been utilized, upheld the validity of former §596(3) of the Penal Law (A. 75a). This appeal followed.

The District Attorney of Queens has consented to the entry of an order staying him from prosecuting the plaintiffs pending disposition of this case.

Summary of Argument

I. The New York Criminal Anarchy Law Violates the First and Fourteenth Amendments of the United States Constitution.

A. The New York Criminal Anarchy statute, enacted in 1902, was first construed by the New York Court of Appeals in 1922 in *People* v. *Gitlow*, 234 N.Y. 132, *aff'd*, 268 U.S. 652. Although the statute as thus construed is admittedly unconstitutional in the light of more recent decisions of this Court, *Dennis* v. *United States*, 341 U.S. 494, *Keyishian* v. *Board of Regents*, 385 U.S. 589, it was resurrected in 1964 and used to convict William Epton, *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9, *cert. denied* and *appeal dismissed*, 390 U.S. 29.

Although the statute is void on its face because (1) it does not contain a requirement that there be a specific intent to overthrow the government, (2) it does not

require a finding of clear and present danger, (3) it speaks in terms of overthrow of "organized government" without limitation to the State, the court in *Epton* sought to reconstrue the statute to include these elements.

The re-interpretation of the statute in *Epton*, accepted by the court below, is still vague and the statute remains unconstitutional. The clear and present danger test, as construed by the Court of Appeals, does not even meet the standards of *Dennis* v. *United States*, *supra*. Furthermore, that test, as well as the requirement of intent, are basically subjective standards meaning different things to different people.

Realistically viewed, the conduct charged in the indictment could not possibly result in a real and imminent threat to the stability of our government; only by the application of a standard as generalized as "clear and present danger" of some undefined evil could the Criminal Anarchy Law be applied to such conduct. An indictment such as this cannot help but have an inhibiting and chilling effect on the exercise of First Amendment rights.

B. This Court has made clear, in a number of recent decisions, that in certain situations it will not apply the doctrine of abstention. See *Baggett* v. *Bullitt*, 377 U.S. 360, *Harman* v. *Forssenius*, 380 U.S. 528. More recently, in *Dombrowski* v. *Pfister*, 380 U.S. 479 this Court held abstention inappropriate where statutes are attacked on their face as violating free speech.

Since the New York Criminal Anarchy statute is overbroad on its face, abstention here would be inappropriate, and an injunction, *Dombrowski* v. *Pfister*, *supra*, and declaratory relief should be granted, *Zwickler* v. *Koota*, 389 U.S. 241.

II. The New Construction of the Criminal Anarchy Statute Violates Plaintiffs' Right to Due Process of Law.

The re-interpretation of the New York Criminal Anarchy Statute by the court in *Epton* and accepted by the court below, violates due process by not affording plaintiffs fair warning of the new construction. The holdings of *Dennis* v. *United States*, 341 U.S. 494, and *Keyishian* v. *Board of Regents*, 385 U.S. 589, together with the non-enforcement of the law for over forty years justifiably led the plaintiffs to assume that the law was unconstitutional. To charge them with criminal conduct, which up to the time of the *Epton* opinion was prohibited only by an unconstitutional statute, violates the very essence of due process and operates as an *ex post facto* law. See *Bouie* v. *City of Columbia*, 378 U.S. 347.

III. The Monetary Qualifications for Grand Jury Service Violate the Fourteenth Amendment.

The $250.00 monetary qualification for grand jury service violates the Equal Protection Clause of the Fourteenth Amendment. What this Court said with reference to the poll tax in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 is equally applicable here, for poverty or affluence bear no relationship to competency to serve as a grand juror.

IV. Federal Legislation Has Preempted the Field of Sedition.

Congressional legislation in the field of sedition indicates a Congressional intent fully to occupy the field, Smith Act, 18 U.S.C. §2385, Internal Security Act of

1950, 50 U.S.C. §781, *et seq.*, leaving no room for the states to enact sedition statutes. *Pennsylvania* v. *Nelson*, 350 U.S. 497, recognized that this legislation made no distinction between sedition directed toward overthrow of the federal government and similar activity directed toward the overthrow of state governments. The federal government has the primary responsibility of protecting the country against all seditious activity including that directed against the states themselves. The variety and disparity of state statutes in this field would interfere with the uniform approach of the federal legislation.

Preemption of state sedition statutes does not leave states powerless to protect themselves for they have innumerable statutes under which to prosecute threatened acts of violence.

V. 28 U.S.C. §2283 Does Not Bar the Granting of an Injunction in the Instant Case.

28 U.S.C. §2283 is not a jurisdictional statute, but rather expresses a principle of comity and equity. *Smith* v. *Apple*, 264 U.S. 274. Courts have always recognized that there existed implied exceptions to the seemingly absolute language of this statute. See *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118. This Court has held that a federal statute permitting an injunction need not mention §2283 in order for the statute to come within the "expressly authorized" language of §2283. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511.

The legislative history of 42 U.S.C. §1983 indicates that it was enacted to protect the rights of the newly enfranchised citizenry and to grant them access to federal courts for the protection of these rights. If these purposes

are to be fully implemented, actions brought under §1983 must be viewed as exceptions to §2283.

The considerations underlying *Dombrowski* v. *Pfister*, 380 U.S. 479 are equally applicable here. The danger to the free exercise of First Amendment freedoms is equally threatened by state proceedings which have been initiated as by state proceedings which have not yet been commenced. The expansion of federal injunctive power would be undermined if §2283 is viewed to bar injunctions in actions brought under §1983.

Argument

POINT I

The New York Criminal Anarchy Law Violates the First and Fourteenth Amendments of the United States Constitution.

A. The New York Statute is both vague and overbroad.

Over the past half century, this Court has considered and struck down a series of State statutes found to be inconsistent with First and Fourteenth Amendment rights of free speech, press and assembly. *Stromberg* v. *California*, 283 U.S. 359, through *Herndon* v. *Lowry*, 301 U.S. 242, to *Baggett* v. *Bullitt*, 377 U.S. 360, *Dombrowski* v. *Pfister*, 380 U.S. 479, and *Keyishian* v. *Board of Regents*, 385 U.S. 589. See also, *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507; *Speiser* v. *Randall*, 357 U.S. 513; *Smith* v. *California*, 361 U.S. 147; *N.A.A.C.P.* v. *Button*, 371 U.S. 415. In some of these cases, statutory language has been found to be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett* v. *Bullitt*, *supra* at 367; *Connally* v. *General Construction Co.*, 269 U.S. 385; *Lanzetta* v. *New Jersey*, 306 U.S. 451. In others, statutes

have been found to be "overbroad" in that their net is "large enough to catch all possible offenders" leaving it to the courts "to step inside and say who could be rightfully detained and who should be set at large." *United States* v. *Reese*, 92 U.S. 214, 221; see *Thornhill* v. *Alabama*, *supra*; *N.A.A.C.P.* v. *Button*, *supra*. *Cf. Aptheker* v. *Secretary of State*, 378 U.S. 500. Often it is difficult to classify statutes in one or the other category. Harlan, J., concurring in *Zwickler* v. *Koota*, 389 U.S. 241, 257. See Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67. Terminology aside, this Court has been quick, especially in recent years, to hold State statutes to high standards of constitutionality out of a recognition that our democracy can survive only if our citizens may engage in the fullest and most vigorous expression of views about public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270; *N.A.A.C.P.* v. *Button*, *supra* at 429.

The instant case presents a somewhat unusual situation. The statute which plaintiffs seek to enjoin is an old one, having been enacted in 1902 in the wake of President McKinley's assassination. It lay dormant until World War I, when it was utilized to convict radicals of that time. *People* v. *Gitlow*, 234 N.Y. 132, *affirmed* 268 U.S. 652. It was then moribund for another 40 years. In 1964 it was resurrected to prosecute William Epton, a radical of our time. *People* v. *Epton*, *supra*. The present prosecution followed hard on the heels of the New York Court of Appeals' affirmance of the *Epton* conviction, an affirmance based on a rewriting of the statute in an attempt to conform to more recent constitutional standards laid down by this Court.[4]

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4. The *Epton* decision was handed down on May 16, 1967. The indictment herein alleged that the acts of criminal anarchy occurred between October 1, 1965 and June 21, 1967, substantially all prior to the decision in *Epton*.

In view of the history of the statute, it can hardly be argued that its meaning and scope are clear. The very same words of the statute have been now given two interpretations, the first, in 1922, being admittedly unconstitutional under current constitutional standards, and the second allegedly consistent with the decision of this Court in *Dennis* v. *United States*, 341 U.S. 494. See *People* v. *Epton*, *supra* at 505; *Dennis* v. *United States*, *supra* at 507; *Yates* v. *United States*, 354 U.S. 298, 318; *People* v. *Ferguson*, *supra* at 830.

A reading of the statute makes the difficulties clear. First, not a word in the statute (§§160, 161) suggests the requirement, recognized at least since *Dennis* v. *United States*, *supra*, that there must be a specific intent to overthrow the government and that the mere teaching of the doctrine or even its advocacy is not sufficient in the absence of such an intent. *Cf. Yates* v. *United States*, *supra*. Second, the statute says not a word about the requirement that a conviction for criminal anarchy can not lie, consistent with the Constitution, without a finding that the conduct of the defendants has created the danger of an evil which is "extremely serious" and with a "degree of imminence extremely high." *Bridges* v. *California*, 314 U.S. 252, 263, so that the civil authorities must act to prevent attempt at the overthrow of the government. Third, the statute speaks in terms of "organized government" without distinction between the State and the Federal government.[5]

The New York Court of Appeals in *Epton* attempted to fill these gaps in the statute, evidently acting on the theory, later enunciated by the court below in this case, that it could

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5. Reference to the broad term "organized government" is also objectionable because it is inconsistent with the decision of this Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497. That aspect of the unconstitutionality of the New York statute will be considered below in Point IV. Argument is made here, in addition, that the language is unconstitutional because it is too broad.

rewrite the statute according to the presumed intent of the New York Legislature of 1902 because "if the 1902 Legislature had known it could not have all it wanted, it would have wanted all it could get" (A. 69a). This principle, implicit in *Epton*, *supra* at 505, and explicit in the decision of the court below, is totally at variance with the constitutional doctrine of this Court. If it were applied, there could be no such thing as an overbroad statute.

Acting on this improper premise, the New York Court "reconstrued" the statute by writing into it (a) a requirement of specific intent, (b) a requirement of "clear and present danger," and (c) a limitation of its terms to sedition directed against the State.

Aside from due process objections to such a procedure (see Point II, *infra*), the statute, even as construed for the second time, violates the Fourteenth Amendment.

The Court of Appeals' new construction, in at least one major respect, provides little improvement over its construction in *Gitlow*. It now construes the statute to incorporate the "clear and present danger" test. But clear and present danger of what? This Court in *Dennis* meant a " 'clear and present danger' of attempting or accomplishing the prohibited crime," 341 U.S. at 505; in this case, overthrow of the government. But as construed and applied by the Court of Appeals in *Epton*, a conviction under the New York statute does *not* require a clear and present danger of the overthrow, or attempted overthrow of organized government. While referring, in passing, to the *Dennis* standard, the court held that standard to be met by a finding of clear and present danger "that. . .riots. . .would be intensified or. . .rekindled." *People* v. *Epton*, *supra* at 502. Such a construction might be appropriate in a statute aimed at prohibiting incitement to riot. It is not an appropriate con-

struction of a statute aimed at prohibiting the overthrow of the government.

The difference is not a trivial one. A riot and the overthrow of organized government are vastly different things. The "clear and present danger" test is meaningless if it permits prosecution for sedition or anarchy on the basis of a clear and present danger of disorder.

Nor is this all. Even as most recently construed, the inherent vices of the statute, vagueness and overbreadth, are left untouched. The statute is now as bad as it was before the *Epton* decision and its inhibitory effect on free debate of public issues is just as chilling.

Although we may tolerate some degree of vagueness or overbreadth in a regulatory or criminal statute not involving free speech, *Omaechevarria* v. *Idaho*, 246 U.S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, such characteristics are intolerable where free speech is the subject of the law, *Winters* v. *New York*, *supra* at 517. In such cases, there is an inhibiting effect, not only on plaintiffs, but on all others similarly situated.

This Court has already found the New York statute to be subject to this defect. Only recently it held that "the possible scope of 'seditious' utterances or acts has virtually no limit" under this law. *Keyishian* v. *Board of Regents*, *supra* at 598-599. The second and fourth counts of the indictment herein allege violation of, or conspiracy to violate, former §161(2), the section specifically condemned in *Keyishian*; the other counts under attack refer to portions of the statute equally vague.

Defendants will answer, as the court below has already answered, that the *Epton* decision has "cleaned up" the statute. We submit that the additional requirements read into the act

afford insufficient protection to the Fourteenth Amendment rights of the plaintiffs and others who seek to speak their mind "although not always with perfect good taste, on all public institutions." *Bridges* v. *California*, *supra* at 270.

Both the intent limitation and the clear and present danger test which were read into the statute are basically subjective standards and mean different things to different men. We cannot afford such imprecise language where speech is involved. If we are to give full protection to "uninhibited, robust and wide open" debate on public issues and to permit "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials," *New York Times* v. *Sullivan*, *supra* at 270, we cannot make the exercise of this right subject to a possible finding by a court and jury that the speaker had one or another intent or that his conduct caused a clear and present danger of some evil which cannot be consistently defined even by the highest court of New York.

The clear and present danger test is particularly restrictive of personal liberties. This case and *Epton* illustrate this perfectly. Realistically speaking, it is inconceivable that a handful of residents of Queens—a few teachers, a grocery storekeeper, a truck driver, a few students—could, in current times, pose an imminent actual threat that the government could be overthrown even if, as alleged, they had managed to collect a few rifles and had had a discussion on guerilla warfare. Such a group might conceivably cause disorder; they might even shoot someone, but these are crimes readily punishable by other statutes.[6] But overthrow the government? No one really believes that, in any

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6. As we note above, p. 3, plaintiffs Ferguson and Harris were both indicted (and later convicted) on charges of conspiracy to commit murder. All of the plaintiffs are charged, in the instant indictment, with crimes such as possession of weapons, conspiracy to commit arson and similar offenses. The people of New York are adequately protected by such indictments.

literal sense. Similarly no one really believes that a man named Epton, by making a speech on the streets of Harlem, could create a clear and present danger to the government of New York City or New York State.[7] The chilling effect of the New York Criminal Anarchy statute is not in any degree lessened by reading into it such a clear and present danger test if it is to be applied as loosely as the Court of Appeals did in *Epton*. Those with a meticulous regard for such statutes or those who merely fear punishment must be discouraged and inhibited by such laws, since they must know, as we all do, that one man's clear and present danger of the overthrow of government is another man's civil unrest caused by intolerable social pressures. If this Court's warning against the inhibitory effect of vague and overbroad statutes in *Button*, *Baggett* and *Dombrowski* is to have any meaning at all, it cannot be satisfied with the formula adopted here.

It will, of course, be argued that the New York court's decision was in conformity with this Court's decision in *Dennis*. We suggest that there is a difference between state and federal statutes in this regard. *Dennis* v. *United States*, *supra* at 502; *Baggett* v. *Bullitt*, *supra* at 81-84. But if there is no such difference, we suggest that *Dennis* should be reexamined in the light of this Court's decisions in the past twenty years.

The District Court sought to meet all of these objections to the statute (as well as the further argument made in Point II, *infra*) by designating the plaintiffs' conduct as "hard-core." "Since the statute embraced more than it permissibly could embrace, it surely embraced the 'hard-core' activities with which

7. Literature on the causes of such disorders is rapidly growing. The most important discussion, of course, is in the Report of the National Advisory Committee on Civil Disorders (the Kerner Commission). See also Conot, *Rivers of Blood, Years of Darkness* (1967). It is generally agreed that the causes of riots are social and economic; it is nowhere suggested in this literature that riots are brought about by conduct such as that alleged here.

they are charged" (A. 71a). We do not understand the designation "hard-core" as having any application to the allegations of the indictment. Certainly the indictment shows no hard-core conduct in relation to the crime alleged. Inflammatory references in the indictment to guns and explosives still cannot turn a tiny group of alleged black militants into an organization with the power to present a clear and present danger to organized government. There is here no charge of a widespread, secret, disciplined organization with national or even international ties which might in some circumstances conceivably threaten the government. *Cf. Dennis* v. *United States, supra* at 511. If we were talking of a conspiracy to commit lesser crimes, perhaps the "hard-core" analysis of the court below might be more relevant. But certainly nothing contained in this indictment justifies such a holding.

Furthermore, the opinion of the court below in this respect does not and never did represent the law in free speech cases. It is inconsistent with the decision in *Winters* v. *New York, supra* where this Court was concerned with the statute's effect on the free speech rights of persons other than the defendant; it is inconsistent with the language in *Dombrowski* v. *Pfister, supra* at 486 ("[W]e have consequently allowed attacks on overbroad statutes with no requirement that the person making the attack demonstrate that his own conduct would not be regulated by a statute drawn with the requisite narrow specificity."); it is inconsistent with the whole doctrine that an overbroad statute in the First Amendment area is invalid and that relief, by injunction, *Dombrowski* v. *Pfister, supra,* or declaratory judgment, *Zwickler* v. *Koota, supra* is available.

If the statute is vague or overbroad, it is unconstitutional, and if it is unconstitutional, it ought not to be enforced against anyone, lest it have a chilling effect on everyone.

B. Abstention is inappropriate in the instant case.

Although this Court early recognized the propriety of injunctive relief, *Ex Parte Young*, 209 U.S. 123, federal courts have often abstained from adjudicating such cases in order to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500. It has become apparent, however, that federal courts will not apply abstention mechanically and will not abstain when useless delay and expense would otherwise result, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 196-197, when State law is not ambiguous, *Harman* v. *Forssenius*, 380 U.S. 528, 535, when a State court interpretation would not eliminate the constitutional issue, *Baggett* v. *Bullitt*, *supra* at 375-379, when the nature of the constitutional deprivation alleged is great, *Harman* v. *Forssenius*, *supra* at 537, and when the claimant has been vested with a right of access to the Federal courts, *McNeese* v. *Board of Education*, 373 U.S. 668, 672. In other cases abstention is not appropriate, for State statutes may be applied by local authorities in an unfair and discriminatory fashion for the purpose of harassing the defendant, *Dombrowski* v. *Pfister*, *supra*, at 490.

Most important in the context of this case, the federal courts will not abstain where State statutes are so restrictive of liberty that their very existence has an inhibitory effect on the exercise of First Amendment rights, for those wishing to exercise those rights may be deterred by the over-breadth of the statute. Such statutes, in current parlance, have a "chilling effect upon the exercise of First Amendment rights." *Dombrowski* v. *Pfister*, *supra* at 487; they result in a general dampening of political activity, often for many years. See, for example, the 18 years during which the Feinberg Law threatened the

political rights of teachers in New York. *Keyishian* v. *Board of Regents, supra.* In such cases, this Court has either enjoined the operation of State statutes, as in *Dombrowski* v. *Pfister, supra*, or has entertained actions for declaratory judgment, as in *Zwickler* v. *Koota, supra.*

In the instant case former §§160 and 161 on their face are clearly overbroad and as this Court recognized in *Keyishian* v. *Board of Regents, supra* at 601, n. 9, abstention would not be appropriate.

POINT II

The New Construction of the Criminal Anarchy Statute Violates Plaintiffs' Right to Due Process of Law.

Perhaps no rule of constitutional law is as basic as that a criminal statute must give clear notice of proscribed acts. The rule is a general rule and applies *a fortiori* where First Amendment rights are involved. *Lambert* v. *California*, 355 U.S. 225, 228; *Keyishian* v. *Board of Regents, supra.*

The New York statute was authoritatively interpreted by the state court in *Gitlow*. This "construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been amended by the Legislature." *Winters* v. *New York*, 333 U.S. 507, 514. It is now conceded by all that the interpretation of the statute in *Gitlow* rendered the law unconstitutional; this was so "as definitely as if [the statute] had been amended by the Legislature." An unconstitutional law is void; to hold that laws heretofore determined to be unconstitutional are merely lying dormant, subject to revival by a later contrary interpretation by the courts would be productive of endless mischief.

The basic problem raised in this view of the case is one of due process and particularly of notice to the plaintiffs that the Criminal Anarchy Law of New York was viable after *Dennis*, *Yates* and *Keyishian*. If every man is presumed to know the law (a presumption which, in this situation, is irrebuttable), he must be presumed to know the law that exculpates him as well as the law that might find him guilty.

It is no answer to cite cases like *Poulos* v. *New Hampshire*, 345 U.S. 395, and *Cox* v. *New Hampshire*, 312 U.S. 569, to the effect that a limiting construction may be applied to conduct occurring prior to that construction "provided such application affords fair warning to the defendants." *Dombrowski* v. *Pfister*, *supra* at 491, n. 7; see also the decision below (A. 71a). There was no fair warning here.[8] On the contrary, plaintiffs had every reason to believe that the statute was a dead letter and it is hard to understand, as the court below suggests (A. 72a), how the *Epton* decision was foreseeable.

That lack of fair warning of a state-court construction of a statute constitutes a violation of due process was most recently recognized by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347, where it stated, at pp. 354-355:

> "When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

See opinion of Warren, C.J., concurred in by Brennan and

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8. The court below found "fair warning" because it thought the conduct charged against plaintiffs was "hard-core" conduct. This concept is no more controlling in considering the due process objections of plaintiffs than in considering their First Amendment objections, and for the same reasons. See *supra*, p. 16.

Stewart, JJ., in *James* v. *United States*, 366 U.S. 213; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456.

One may reasonably be charged with foreknowledge of how a court will interpret a statute but he cannot reasonably be charged with foreknowledge that a court will reverse itself. *Cf. United States* v. *Murdock*, 290 U.S. 389, where this Court held that the defendant could not even be charged with foreknowledge of the Court's subsequent interpretation of the Fifth Amendment.

The court below further sought to answer plaintiffs by arguing that even if the Court of Appeals had "transcended [its] powers" by, in effect, amending the statute, "this would be entirely a matter of state law and not one of federal concern" (A. 70a). Perhaps so, if we are speaking of the state's violation of the doctrine of separation of powers; not so, if we are speaking of due process and the failure of the state court to give "fair warning" that it would arrogate to itself a legislative function.

POINT III

The Monetary Requirement for Qualification as a Grand Juror Violates the Equal Protection Clause of the Fourteenth Amendment.

Former §596(3) of the Judiciary Law, *infra*, pp. 37-38, establishes a $250.00 monetary qualification for grand jury service, a qualification in violation of the Equal Protection Clause of the Fourteenth Amendment.[9]

In *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, this Court struck down Virginia's poll tax of $1.50 stating:

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9. The monetary qualification has been eliminated from the new Judiciary Law, Sec. 596, which became effective September 1, 1967. However, the grand jurors who indicted plaintiffs were selected under the old law.

> "...We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.
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> * * *
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> "...wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 666, 670.

What the Supreme Court said with reference to the poll tax in *Harper* is equally applicable here. Poverty or affluence bear no relationship to competency to serve as a grand juror. Those who are poor are as competent to serve as those who are rich. To condition grand jury service upon a showing of monetary worth runs contrary to the very notion that the grand jury must represent a cross-section of the community.

The court below (A. 75a) recognized that a "modest property qualification for grand jurors might now be held unconstitutional." However, it dismissed plaintiffs' challenge contending that an affidavit of the Queens County Clerk demonstrated that "the property requirement had no significance in his selection of jurors" (A. 75a). However, the County Clerk's affidavit did not state that the "property qualification had no significance" in selecting jurors. On the contrary, his affidavit indicated that the property qualification question was asked of all prospective jurors (A. 58a). That the Clerk knows of no prospective juror disqualified solely on this ground is not important (A. 58a). That the question is asked is important.

POINT IV

Federal Legislation Has Preempted the Field of Sedition and States May Not Pass Statutes Proscribing the Overthrow of State Governments.

When Congress enacts legislation within an area of its competence, the field is preempted and the states may not act. *Pennsylvania* v. *Nelson*, 350 U.S. 497; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Hines* v. *Davidowitz*, 312 U.S. 52. Federal legislation in the field of sedition has preempted the states from enacting statutes, such as former §§160 and 161 of the New York Criminal Anarchy Law, which proscribe advocacy of the overthrow of "organized government." "Organized government" has been interpreted by *People* v. *Gitlow*, *supra* at 138, to mean "all organized government in this country, whether it be that of the city, state or nation.[10]

That Congress has pervasively legislated in the field of sedition is apparent. A series of Congressional statutes presently in effect shows a Congressional intent to exercise the broadest powers available to it in this area. The most important statute is the Smith Act, 18 U.S.C. §2385. This statute makes it a crime to advocate or teach the duty or desirability of overthrowing or destroying

> "the Government of the United States or the government of any state, territory, district or possession thereof; or the governments of any political sub-division therein, by force or violence, or by the assassination of any officer of any such government."

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10. The indictment in the instant case alleges that the plaintiffs' acts were addressed to "organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies". The indictment in an effort to save the statute thus defines the term "organized government" in a manner different from the statute.

The Smith Act was followed by the enactment of the Internal Security Act of 1950, 50 U.S.C. §781, *et seq.*, and the Communist Control Act of 1954, 50 U.S.C. §841, *et seq.* The latter statute applied the provisions and penalties of the Internal Security Act to a member of any organization whose purpose was to overthrow by force and violence "the Government of the United States, or the government of any state or political subdivision thereof." (50 U.S.C. §843).[11]

The above statutes make no distinction between seditious activities directed toward the overthrow of the Federal Government and similar activities directed toward the overthrow of state or local governments. Congress proscribed sedition "against all government in the nation—national, state and local". *Pennsylvania* v. *Nelson*, *supra* at 505.

The considerations underlying the holding of this Court in *Pennsylvania* v. *Nelson* are equally applicable here where a state is attempting to proscribe conduct explicitly covered by the Smith Act. This Court recognized in *Pennsylvania* v. *Nelson*, *supra* at 504, the pervasiveness of Federal statutes in the field of sedition, stating that:

> "Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."

The Federal government has the primary responsibility of protecting this country against all forms of seditious activity. The proscription against the overthrow of state and local gov-

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11. The statute also alleged (50 U.S.C. Sec. 842) that the purpose of the Communist Party is to overthrow "the Government of the United States, or the government of any State, Territory, District or possession thereof or the government of any political subdivision therein by force or violence."

ernments contained in the Smith Act flows directly from the obligation of the Federal government "to guarantee to every State in this Union a Republican Form of Government." United States Constitution, Art. IV, §4; Internal Security Act, 50 U.S.C. §781(15).

Although the vast majority of States have made it a crime to advocate the overthrow of government, their statutes are varied and their enforcement would conflict with the uniform approach of Congressional legislation.[12] The State statutes are called "sedition statutes," "criminal syndicalism laws," and "criminal anarchy laws." Many of them are unconstitutionally vague and overbroad providing insufficient safeguards for the protection of constitutional rights.[13] Some make it a crime to overthrow the federal as well as state government;[14] others limit themselves to the overthrow of state government;[15] others just speak in terms of "government" without further definition.[16] In addition, the penalties vary.[17] Furthermore,

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12. At least some states (New Mexico, Missouri, North Dakota, Oregon, South Carolina) feel amply protected by the Smith Act for they do not have statutes making it a crime to overthrow any government.

13. Miss. Code Anno. Sec. 2399. "Any person who advocates in writing or in print or verbally, or otherwise, the overthrow of the Constitution or Government of the United States or the constitution or the government of the State of Mississippi, by violence shall be deemed guilty of a felony. . . ." See also Fla. Stat. Anno. Secs. 876.01, 876.02; Ga. Code Anno. Sec. 26-903a (Supp. 1963); Ill. Rev. Stat. ch. 38, Sec. 30-3; La. Stat. Anno. Sec. 14:115; Mich. Stat. Anno. Sec. 28.243(2); New Jersey Stat. Anno. Sec. 2A:148-7; N. Carolina Gen. Stat. Sec. 14-11; Rhode Island Gen. Laws Sec. 11-43-12; Va. Code Sec. 18.1-421 (Supp. 1962); W. Va. Code Sec. 5912. See also *Brandenberg* v. *Ohio*, No. 492, Oct. Term, 1968 and *Younger* v. *Harris*, No. 163, Oct. Term, 1968, challenging the constitutionality of the criminal syndicalism statutes of Ohio and California. These latter statutes are similar to those contained in many other states.

14. Del. Code Sec. 862; Texas Civil Stat. Anno. 6889-3A, Sec. 5; Wisc. Stat. Anno. Sec. 946.03.

15. Ill. Rev. Stat. Ch. 38, Sec. 30-3; Neb. Rev. Stat. Sec. 28-748 (Supp. 1963).

16. Nev. Rev. Stat. Sec. 203.130; New Jersey Stat. Anno. Sec. 2A:148-7; Rev. Code Wash. Anno. Sec. 9.05.010.

17. Arizona Rev. Stat. Sec. 13-707 (Supp. 1963) (up to 20 years and/or up to $20,000 fine); Mass. Laws Anno. C. 264, Sec. 11 (up to 3 years or $1,000 fine); Neb. Rev. Stat. Sec. 28-748 (Supp. 1963) (1-20 years).

some statutes appear to punish mere membership in subversive organizations,[18] contrary to the requirements laid down in *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Aptheker* v. *Secretary of State*, 378 U.S. 500. See *Pennsylvania* v. *Nelson*, *supra*, at 508.

Nothing in either *Pennsylvania* v. *Nelson*, *supra*, *Uphaus* v. *Wyman*, 360 U.S. 72 or *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, holds that a state may proscribe seditious activity directed against itself. In *Nelson*, this Court, in enumerating situations in which the states were free to act, did *not* list sedition directed against a state as such a situation (350 U.S. at 500). In discussing and distinguishing *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 and *Gilbert* v. *Minnesota*, 254 U.S. 325, this Court made clear that states could prosecute for offenses already prohibited by federal law if a different aspect of the alleged conduct violated the police power of the state. Thus, in *Fox* a federal statute against the passing of counterfeit money was held not to bar a state prosecution for defrauding the person to whom the spurious money was passed. The state statute in *Gilbert* was upheld as a "local police measure." But the New York Criminal Anarchy Law is not such a "local police measure." It covers the same kind of conduct, in substantially identical language as the Smith Act and both are intended to protect the same interest of society.

In *Uphaus* v. *Wyman*, *supra*, this Court, in affirming a state contempt conviction relating to refusal to answer questions posed by a New Hampshire Legislative Committee, stated, at p. 76, that *Nelson* proscribed a "race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself."

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18. Ga. Code Anno. Sec. 26-904a; Minn. Stat. Anno. Sec. 609.405; Wash. Rev. Code Anno. Sec. 9.05.020.

First, it must be noted that a "race to the courthouse door" will result so long as state prosecutions for sedition against the state is permitted, for the Smith Act proscribes sedition against both the federal and state governments. Even more important, however, this Court, in the dictum above quoted from *Uphaus*, ignored the realities of modern life. A revolutionary movement which seeks the overthrow of only the state government, and not the federal, is difficult to conceive in the highly integrated society of today. *Cf. Luther* v. *Borden*, 48 U.S. (7 How.) 1.

The dictum at p. 76 of the *Uphaus* decision can be reconciled with the doctrine of *Nelson* by reading it in connection with the language of the Court's illustrations, at p. 77, of permissible state action:

> "Thus registration statutes, *quo warranto* proceedings as to subversive corporations, the subversive instigation of riots, and a host of other subjects directly affecting state security furnish grist for the State's legislative mill."

These examples are a far cry from the activities with which the plaintiffs have been charged herein.

In *DeGregory* v. *Attorney General of New Hampshire*, *supra*, this Court, citing *Pennsylvania* v. *Nelson*, *supra*, reversed another New Hampshire contempt conviction, stating in the course of its opinion, "There is no showing whatsoever of present danger of sedition against the State itself, the only area to which the authority of the State extends." (383 U.S. at 829-830).

The meaning of this language is somewhat obscure. The *Nelson* opinion not only made no distinction between what may be termed "state sedition" and "federal sedition", but

expressly noted that the Smith Act's prohibition extended to state as well as federal sedition. (350 U.S. at 502).

Furthermore, taken in the context of the case, the Court's language in *DeGregory* makes clear that it was talking about the power of a state legislative committee to conduct *investigations*, not with the power of a state to proscribe seditious activities.

A holding that the state sedition statutes are preempted does not mean that states are powerless to protect themselves. This Court recognized in *Nelson* that states may "enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct." (350 U.S. at 500). Beyond that, however, the state has enacted innumerable statutes under which threatened acts of violence may be prosecuted. The instant case is an example. The plaintiffs were indicted not only for criminal anarchy but also for conspiracy to commit arson, and for 41 counts of illegal possession of weapons. Two of them were charged in a separate indictment with conspiracy to murder. In addition the state has the power to prosecute under statutes relating to homicide, arson, riot, inciting to riot, and unlawful assembly.[19]

If the states are to be permitted to prosecute the conduct prohibited by the Smith Act simply because overthrow of the state government is an incident of a design to overthrow the government generally, then the rule of *Nelson* is reduced to a mere matter of pleading. Indeed, that was the case in the Queens County prosecution here under attack. The first indictment had alleged that plaintiffs had advocated the duty of over-

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19. New York's Penal Law former Secs. 1041, 221, 2090, 2091, 2092 respectively. These Sections have their counterpart in the new Penal Law. See 125.25, 150.15, 240.06, 240.08, 240.10.

throwing "organized government". This indictment was dismissed on the ground that it conflicted with the holding in *Nelson*. *People* v. *Ferguson*, 55 Misc. 2d 823, 831 (1968). The grand jury thereupon found a superseding indictment alleging advocacy of the overthrow of New York State.

POINT V

28 U.S.C. §2283 Does Not Bar the Granting of an Injunction in an Action Brought Under 42 U.S.C. §1983.

The plaintiffs' demand for an injunction here, in addition to a declaratory judgment, raises the question of whether the provisions of 28 U.S.C. §2283, *infra*, p. 39, bar such relief in an action brought under 42 U.S.C. §1983, *infra*, p. 39.

It will be argued by defendants that *Dombrowski* is distinguishable from the instant case since there the state proceedings had not been initiated prior to the institution of the federal court action, while here the state court proceedings were under way when this action was commenced.

It should be noted at the outset that §2283 is not a jurisdictional statute, but rather expresses a principle of comity and equity. *Smith* v. *Apple*, 264 U.S. 274, 278-279. In *Baines* v. *City of Danville*, 337 F. 2d 579, (4th Cir. 1964) *cert. denied*, 381 U.S. 939, the court stated, at p. 593, that §2283 ". . .is not a jurisdictional statute. It is a limitation upon the exercise by a District Court of its equity jurisdiction." The court further noted:

> "Since the statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury." (Id. at 593, footnotes omitted.)

See also, *Southern California Petroleum Corp.* v. *Harper*, 273 F. 2d 715, 718 (5th Cir. 1960).

Consideration of the history of §§2283 and 1983, the interpretation given to them by the courts, and the considerations underlying *Dombrowski* lead to the view that §1983 is an exception to the rule of comity set forth in §2283.

§2283 dates back to the Act of March 2, 1793, 1 Stat. 333, ch. 22 (1793) which stated: "nor shall a writ of injunction be granted to stay proceedings in any court of a state. . . ." In 1875 the language was rephrased and an exception was added relating to bankruptcy proceedings, Rev. Stat. §720 (1875).[20] This provision, slightly modified, was incorporated into the Judicial Code of 1911 (§265, 36 Stat. 1162) and remained until the Judicial Code of 1948 which enacted §2283 as it presently reads.

Even before 1948, federal courts had recognized that there existed implied exceptions to the language of §265 (the predecessor to §2283). These implied exceptions included statutory ones, i.e. exceptions apparently authorized by other federal statutes. In *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132-134, this Court dealt at length with §265 and expressed disapproval of the "implied exceptions" (other than ones authorized by statutes) which the federal courts had engrafted onto §265. The Court concluded that the only true exception to the statutory command of §265 were cases involving possession of a *res*.

Even following *Toucey* v. *New York Life Ins. Co.*, *supra*, and before the enactment of the Judicial Code of 1948, however, this Court continued to recognize "exceptions" to §265.

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20. The exception read "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Porter* v. *Dicken*, 328 U.S. 252, this Court considered a case arising under the Emergency Price Control Act of 1942 (56 Stat. 23) and held that that Act was one of these exceptions.

In 1948 the Judiciary Code was revised to read in its present form. The Reviser's notes to §2283 state that it was intended to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."

Since 1948, this Court has continued to recognize that a federal statute permitting an injunction need not expressly mention §2283 in order for it to be considered "as expressly authorized by Act of Congress."[21] *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 516; *Dilworth* v. *Riner*, 343 F. 2d 226, 230 (5th Cir. 1965). See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220.[22]

An examination of the purpose sought to be achieved by the enactment of §1983 leads only to the conclusion that it must be read as an exception to §2283.

§1983 is derived almost intact from section 1 of the 1871 "Act to Enforce the Fourteenth Amendment".[23] The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the federal government be given the principal responsibility for this protection. These Congresses had also passed the Thirteenth, Fourteenth and Fifteenth Amendments, which the Court said in *Strauder* v. *West Virginia*, 100 U.S. 303, 306-307, had a common purpose:

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21. It would also appear that specific language permitting an injunction against state court proceedings need not be explicitly set forth in the federal statute authorizing such relief. Otherwise the statutory exemptions, recognized in *Toucey* v. *New York Life Ins. Co.*, *supra*, would all be repealed by the 1948 revision. However, as noted above, the Reviser's notes indicate that this revision was intended to "restore" the law prior to *Toucey*.

22. In *Dilworth* v. *Riner*, *supra*, the court held that Title II of the Civil Rights Act of 1964 constituted an exception to Sec. 2283.

23. Act of April 20, 1871, ch. 22, Sec. 1, 17 Stat. 13.

> "namely; securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments. . .cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. . . . [The Fourteenth Amendment]. . .was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States."

See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of §1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113. As recently stated in *Monroe* v. *Pape*, 365 U.S. 167, 180, its aim was:

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."

If these purposes are to be fully implemented, §1983 must be regarded as an exception to §2283; otherwise the statutory scheme for the protection of constitutional rights would be rendered nugatory, whenever the state's action took the form of a legal proceeding.

Those courts which have, in recent times, considered the question of a federal court's power to issue injunctions have emphasized the responsibility that federal courts exercise in protecting federally granted rights. *Browder* v. *Gayle*, 142 F. Supp. 707, 713 (M.D. Ala. 1956), *aff'd per curiam*, 352 U.S. 903.

In *Morrison* v. *Davis*, 252 F. 2d 102 (5th Cir. 1958), *cert. denied*, 356 U.S. 968, the district court had granted an injunction against Louisiana and New Orleans statutes requiring segregation on public buses. The Court of Appeals, in affirming, stated, at p. 103:

> "This is not such a case as requires the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U.S.C.A. §1983."

Can it be said, however, that if the initiation of state proceedings constitutes the state action complained of, the federal court is powerless by virtue of §2283 to protect the federal rights and grant the requested relief?

The considerations which underlie *Dombrowski* are equally applicable in the present situation and reinforce the view that §1983 is an exception to §2283. As noted above, this Court in *Dombrowski* was concerned that a criminal prosecution under a statute "regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." 380 U.S. at 486. The Court went on to recognize that

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution

> to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Ibid.*

These considerations are equally applicable here. The danger to the free exercise of First Amendment freedoms is even more threatened by state proceedings which have been initiated than by state proceedings which have not yet been commenced.[24] The rationale of *Dombrowski*, with its expansion of federal court injunctive power, is undermined if §2283 is viewed as a bar to the institution of a suit under §1983.

In his dissenting opinion in *Dombrowski*, Justice Harlan recognized that it would be illogical to view the instituting of a state proceeding as the factor determining whether a federal court could issue an injunction. He stated:

> "[S]ince appellants were able to reach a federal court before the State instituted criminal proceedings against them, they are now immunized with a federal vaccination from state prosecution. To make standing and criminality turn on which party wins the race to the forum of its own choice is to repudiate the 'considerations of federalism'. . .to which the Court pays lip service." 380 U.S. at 502.

In *City of Greenwood* v. *Peacock*, 384 U.S. 808, decided after *Dombrowski*, the petitioners in their removal petition had

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24. The issuance of an injunction by this Court will cause no greater "conflict" between federal and state courts than in *Dombrowski*. There the plaintiffs had been arrested on October 4, 1963. The arrest warrants were vacated by a Criminal Court Judge on October 25. The plaintiffs then brought suit in the federal courts. Following the District Court's dismissal of the complaint, the plaintiffs were indicted. Thus at the time the Supreme Court issued its decision an indictment was pending against the plaintiffs. The Court's remand to the District Court for the issuance of a decree restraining prosecution of the indictments against the plaintiffs thus had the practical effect of staying a pending state proceeding, which is exactly the situation presented herein.

alleged, *inter alia*, that the state statute under which they were being prosecuted was unconstitutionally vague on its face. This Court reversed the lower court's grant of the removal petition, saying, at p. 829:

> "But there are many other remedies available in the federal court to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22."

This Court thus recognized that in the circumstances of that case (where removal was obviously sought after the state prosecutions had commenced), a federal injunction would be a remedy available to petitioners. The four dissenting justices thought that removal was an available remedy in the case. Of more importance to the issue here, however, was their explicit recognition that a federal court could enjoin pending state prosecutions.

> "Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We said in NAACP v. Button, 371 U.S. 415, 433, respecting some of these federal rights, that '[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' In a First Amendment context, we said: 'By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we

> have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.' *Dombrowski* v. *Pfister*, 380 U.S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right." 384 U.S. at 845-846.

If 42 U.S.C. §1983 is to fully protect the assertion of federal rights, it must be viewed as an exception to 28 U.S.C. §2283.

CONCLUSION

The judgment of the court below should be reversed and the court directed to issue a declaratory judgment that former §§160, 161 and 163 are unconstitutional and to enjoin any prosecution of the plaintiffs under these sections.

Respectfully submitted,

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January 23, 1969

APPENDIX

New York Penal Law

"§160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"§161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both."

"§163. Permitting premises to be used for assemblages of anarchists

The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by section one hundred and sixty-two, or who, after notification that the premises are so used permits such use to be continued, is guilty of a misdemeanor, and punishable by imprisonment for not more than two years, or by a fine of not more than two thousand dollars, or both."

"§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

* * *

Each of them is guilty of a misdemeanor."

New York Judiciary Law

"§596. Qualifications of jurors

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

* * *

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value."

18 U.S.C. §2385. Advocating overthrow of Government

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof–

Shall be fined not more than $20,000 or imprisoned not more than twenty years,* or both, and shall

* The 1956 Amendment substituted "$20,000" for "10,000" and "twenty years" for "ten years".

be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.*

As used in this section, the terms "organizes" and "organize," with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons."**

42 U.S.C. §1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §2283. Stay of State court proceedings

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

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* The 1956 Amendment added this paragraph
** The 1962 Amendment added this paragraph